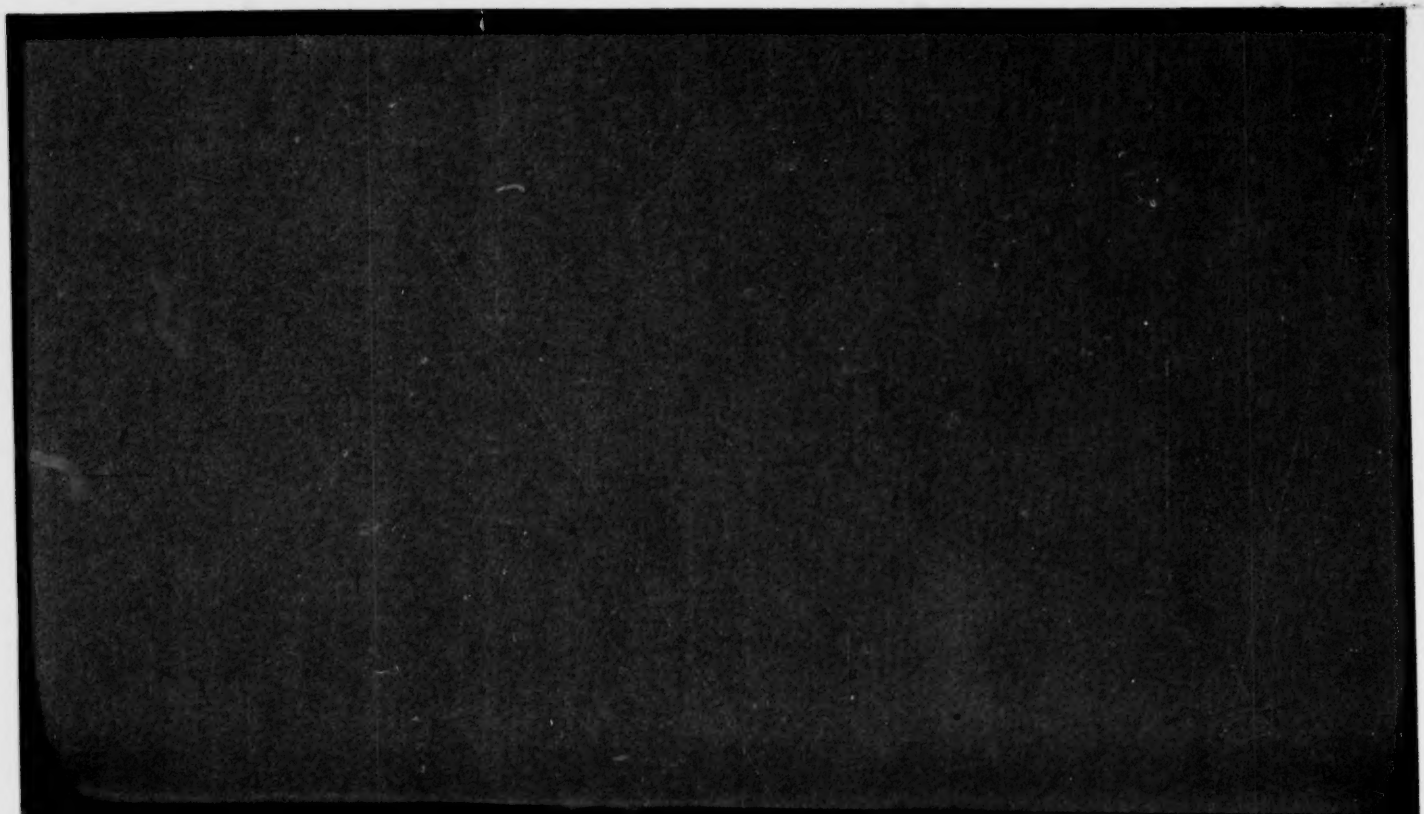
In the Supreme Court of the United States.

OCTOBER TERM, 1901.

BENJAMIN D. GREENE, JOHN F. GAYNOR, WILLIAM T. GAYNOR, and EDWARD H. GAYNOR, appellants,
v.
WILLIAM HEISER, UNITED STATES MARSHAL in and for the southern district of New York.

No. 365.

MOTION TO ADVANCE.



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The Solicitor-General moves the court to advance this case and assign it for argument on the earliest day convenient to the court during the present term for the following reasons:

1. On December 8, 1899, at the November term, 1899, of the United States district court for the eastern division of the southern district of Georgia, a true bill of indictment was found by the grand jury charging, in several counts, the defendants, Benjamin D. Greene, John F. Gaynor, William T. Gaynor, and Edward H. Gaynor, and others, with conspiracy with Oberlin M. Carter, late captain of the United States Army and engineer officer in charge of the Savannah engineering district, to defraud the United States, and conspiracy to present false accounts in violation of sections 5440 and 5438 of the Revised Statutes.

2. On December 14, 1899, the defendants, Benjamin D. Greene, John F. Gaynor, William T. Gaynor, and Edward H. Gaynor, were arrested in the southern district of New York on a warrant issued by John H. Shields, United States commissioner, based upon an affidavit charging them with having committed, in the eastern division of the southern district of Georgia, the offense described in the indictment, to which affidavit a certified copy of the indictment was attached and referred to.

3. In due course the defendants were brought before the commissioner for a hearing, and the Government offered in evidence a duly certified copy of the indictment, together with the testimony of witnesses, fully identifying the defendants as being the persons so indicted and proving they had been in the eastern division of the southern district of Georgia during the period in which they were charged with having committed the offense described in the indictment. The defendants offered no testimony to show they were not the persons indicted, or to show they had not been in the eastern division of the southern district at the time the offense was charged to have been committed, but did consume several months in offering testimony tending to disprove their guilt of the charge set out in the indictment, all of which being directed solely to the question of guilt or innocence on the merits of the case was excluded by the commissioner as incompetent.

4. On February 20, 1900, the defendants having finally ceased to offer testimony, the commissioner duly made and entered his order on the complaint, finding

probable cause to believe the defendants guilty, and committing them to the custody of the marshal to await a warrant for their removal from the southern district of New York to the southern district of Georgia for trial. Thereupon a motion for a warrant to remove them was promptly made before the United States district judge, Hon. Addison Brown, the record of the proceedings before the commissioner being produced and full argument had.

5. On April 4, 1900, after having taken time to consider, Judge Brown delivered his opinion, holding that a valid indictment, supported by evidence identifying the defendants as the persons charged in the indictment, and establishing the fact they were in the district where the indictment was found at the time when the offense was charged to have been committed, was not sufficient to authorize the issue of a warrant of removal over the objection of the defendants; that a certified copy of the indictment was to be treated by the commissioner merely as an ex parte affidavit, subject to be rebutted by evidence offered by the defense, precisely as in a case where there is no indictment.

6. On June 26, 1900, in pursuance of this opinion, Judge Brown made an order sending the case back to the commissioner "for further competent testimony offered by either side in accordance with the opinion rendered herein."

On July 6, 1900, in pursuance of this order, the hearing before the commissioner was recommenced. The Government was compelled to and did introduce a large

number of witnesses, and offered an immense amount of documentary evidence to establish the guilt of the defendants, but closed its case on August 13, 1900.

The defense then consumed more than three months in introducing its evidence, closing on November 16, 1900.

Two days were consumed by the Government in rebuttal, the case upon the testimony being closed November 19, 1900.

The oral evidence before the commissioner covered some 5,000 typewritten pages, and several trunks full of documents were introduced. Voluminous briefs were printed, oral arguments made, and the case finally submitted to the commissioner, who on February 25, 1901—a year and five days after his first finding—made a second finding of probable cause of guilt, this time upon the entire record of evidence, and again ordered the defendants committed to the custody of the marshal to await the warrant of removal.

At once a second motion for a warrant was made to Judge Brown, of the United States district bench.

7. On May 15, 1901, Judge Brown, having taken time to consider, delivered his opinion, holding that not only had the Government established probable cause to believe there was fraud in the letting of the contracts for river and harbor improvements by Carter and the defendant contractors, but that—

It is shown beyond question that Captain Carter, the employee of the Government, and the engineer in immediate charge of the work on the Government's behalf, had, for several years

immediately preceding the contract referred to in the indictment, received from the contractors continuously, through his father-in-law, in many divisions of profits, one-third of the final net proceeds of each contract, remaining for division among the chief contractors, and that this one-third amounted in the aggregate to over $700,000.

On May 28, 1901, in accordance with this opinion, Judge Brown issued his warrant to the marshal for the removal of the defendants to Georgia for trial.

8. But they were not so removed, for immediately upon being taken into custody by the marshal they applied to the circuit court of the United States for the southern district of New York for a writ of habeas corpus, alleging they were being illegally held in custody by the marshal, and attached to the application the processes and pleadings in the proceedings before the commissioner and before the United States district judge, and the several findings of the commissioner and the findings and the opinions of the district judge, together with only so much of the evidence as related to the attack made on the legality of the impaneling of the grand jury, the contention of the defendants being that the indictment was void because of irregularities in impaneling the grand jury, and was, moreover, defective in form and substance, and that there could be no removal upon a complaint supported by proof of guilt, if their contention as to the insufficiency of the indictment could be sustained. It is hardly necessary to say that the United States circuit court (Judge Lacombe) denied the application for the writ. From this order denying their application,

the defendants made, on June 8, 1901, an appeal to this court.

CONCLUSION.

The above statement of the efforts of the Government to secure the removal of Carter ~~and his~~ co-conspirators to Georgia for trial is enough in itself to show the absolute necessity of advancing this case for hearing at the earliest possible time. Judge Brown found that the testimony introduced by the Government before the commissioner showed beyond question that Carter received over $700,000, being one-third of the amount of which the Government was defrauded through this conspiracy. *Carter got over $700,000, and has been doing time in the Leavenworth penitentiary since April 27, 1900. These defendants got twice as much, and are still at large.*

The Government has spent thousands of dollars and used every effort to bring them to trial, but they have not yet even been brought to the bar and compelled to plead to the indictment found against them two years ago. Their whole fight is for delay. The reason is apparent. Already four of the most important witnesses for the Government have died. Their testimony can not be replaced. If it is not possible for the Government to put a stop to the operation of this policy of delay, a deplorable failure of justice in this case will inevitably result.

JOHN K. RICHARDS,
Solicitor-General.

OCTOBER 8, 1901.

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